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IN THE

Supreme Court of the United States

NATIONAL MINING ASSOCIATION,
Petitioner,

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

HAROLD P. QUINN, JR.
KATIE SWEENEY
NATIONAL MINING ASSOCIATION
101 Constitution Ave., N.W.
Washington, D.C. 20001
(202) 463-2600

CATHERINE E. STETSON *
CHRISTOPHER T. HANDMAN
JESSICA L. ELLSWORTH
HOGAN & HARTSON LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5491

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR PETITIONER[1]

1. The briefs in opposition acknowledge that Congress has repeatedly—over a hundred times in the course of over a hundred years—enacted land restrictions and regulations that are subject to "valid existing rights" ("VER"). The briefs in opposition also recognize that these statutes encompass a wide spectrum of land-use restrictions and requirements enforced by numerous federal agencies, from the Department of the Interior's Bureau of Land Management and Office of Surface Mining Reclamation and Enforcement ("OSM") to the Department of Agriculture's Forest Service. Yet respondents maintain that the D.C. Circuit's

[1] Petitioner's Rule 29.6 Statement appears at Pet. ii.

holding—that Congress in repeatedly employing the phrase "valid existing rights" in those many statutes intended to confer on each responsible agency essentially unreviewable interpretive authority to declare what the term means—is just *Chevron* interpretation as usual.

It is not. The D.C. Circuit's decision upended the established understanding of how courts interpret statutes, establishing a broad new *Chevron* precedent for future use in similar circumstances. The court found the term "valid existing rights" to be categorically ambiguous because the dictionary sometimes defines the word "right" to be a property right and sometimes does not. Thus, according to the D.C. Circuit, when Congress used the established phrase in SMCRA,[2] it must have intended to imbue OSM with broad authority to define and interpret the term to suit its own purposes. That overly accommodating treatment of agency interpretation, as we explained in the petition, effectively makes every case a *Chevron* step two case.

The D.C. Circuit's unorthodox approach to statutory interpretation conflicts with this Court's decisions and warrants review. This Court's precedents have never permitted statutory interpretation to turn on whether close textual review of a single word reveals multiple abstract definitional possibilities—and thus "ambiguity." Courts rather are instructed to apply the familiar, established tools of statutory construction in discerning a statute's meaning. *See Regions Hosp.* v. *Shalala*, 522 U.S. 448, 457 (1998) ("If, by 'employing

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[2] *Surface Mining Control and Reclamation Act of 1977*, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201 *et seq.*).

traditional tools of statutory construction,' we determine that Congress' intent is clear, 'that is the end of the matter.' ") (quoting *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *see also Brown* v. *Gardner*, 513 U.S. 115, 118-120 (1994) (rejecting agency definition of "injury" based on statutory context and structure, while acknowledging that agency had relied on common usage of the term); *see* Pet. 16-20. Only if a statute remains ambiguous *after* examining its structure, context, and purpose may a court defer to an agency's interpretation (so long as it is reasonable). *See, e.g., National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007); *Dolan* v. *United States Postal Serv.*, 546 U.S. 481 (2006). Any standard looser than this rigorous two-step analysis would raise a serious separation-of-powers problem; for it would empower Executive Branch agencies to rewrite—if not repudiate—otherwise clear congressional mandates. *See United States* v. *Mead Corp.* 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (*Chevron* doctrine is "rooted in a legal presumption of congressional intent, important to the division of powers between the Second and Third Branches.").

2. The briefs in opposition implicitly acknowledge the conflict between the D.C. Circuit's interpretive approach and this Court's precedents by belatedly attempting to introduce these settled interpretive concepts into the case. *See* U.S. Opp. 14-16; Kentucky Resources Council (KRC) Opp. 8-9. In employing interpretive tools the court of appeals did not mention in its opinion, the briefs in opposition have only highlighted—not dispelled—the sharp and certworthy conflict identified in the petition.

The Government suggests that the court's failure to address SMCRA's structure in its *Chevron* step-one analysis could mean that the court contemplated the statute's structure and concluded there was nothing to say about it. U.S. Opp. 15-16. Nothing in the decision supports that post hoc assessment. Kentucky Resources Council similarly contends that even though the court's opinion does not examine SMCRA's structure, purpose, or context, the court might have considered these traditional tools of statutory construction and opted not to discuss any of them in its ruling—or to explain why they were as "untelling" as Kentucky Resources claims them to be. KRC Opp. 9-10.

But the D.C. Circuit's decision was far from the "standard" and "unremarkable" *Chevron* analysis the Kentucky Resources Council portrays it as. KRC Opp. 1, 10. The court minted a non-standard, and quite remarkable, rule of statutory interpretation: When a single word in an established phrase has multiple dictionary definitions, an agency with the obligation to interpret that phrase will be accorded deference if their chosen approach falls within any of the available definitions. This unprecedented approach to *Chevron* deference radically expands the deference accorded to agencies, raises separation-of-powers questions, and inexorably tends toward the conclusion that nearly every statute is ambiguous.

The Solicitor General comfortingly suggests that the D.C. Circuit's decision "cannot be expected to have broader implications." U.S. Opp. 13. But the Solicitor General never explains how that could be so. The phrase "valid existing rights" *alone* has been employed in over 100 statutes and is subject to

interpretation by several different agencies. And if the D.C. Circuit's analysis were to be applied to other similarly well-worn agency terms of art that crop up often in the D.C. Circuit's docket ("feasible alternative,"[3] say, or "any physical change"[4]), the impact of the court's expansive *Chevron* deference becomes plainer still.

The Kentucky Resources Council for its part argues that the D.C. Circuit's opinion does not hold that "*all* terms of art are means by which Congress delegates policy-making authority." KRC Opp. 10 (emphasis in original). It is cold comfort to petitioner, its amici, and other industries and entities potentially affected by the court's new *Chevron* regime that only *some* terms of art are categorically ambiguous. And respondents offer no guidance as to when and how the D.C. Circuit in the future will determine when a term of art in a statute will contain "ambiguous" language delegating broad discretion—and when the phrase will be given its established meaning.

3. One of the most troubling consequences of the court's decision, in fact, is precisely that Congress endorsed a freewheeling agency interpretation of a term of art with a long history and an industry meaning.

Indeed, OSM itself acknowledged that until this case, VER has been a term of art in all Federal laws *other than* § 522(e) of SMCRA. 64 Fed. Reg. 70,766, at 70,794 (Dec. 17, 1999) ("Our review of these

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[3] 49 U.S.C. § 303(c).

[4] 42 U.S.C. § 7411(a)(4); *New York* v. *EPA*, 443 F.3d 880, 883-890 (D.C. Cir. 2006) (rejecting agency's dictionary definition of statutory term in light of precedent and statutory structure).

statutes, applicable case law, and the literature discussing them indicates that the VER provisions in these laws and pertinent executive orders usually protect an expectation or property interest that arose under an earlier law which is normally a Federal public lands law but may occasionally be State law."). It is precisely when Congress repeatedly uses a term that we have the clearest indication of congressional intent. See *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) ("In the absence of contrary indication, we assume that when a statute uses [a term of art], Congress intended it to have its established meaning."); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art * * * absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them").

4. Both respondents point to subsequent D.C. Circuit decisions to suggest that the novel rule embraced by the panel below was merely an aberration. U.S. Opp. 16; KRC Opp. 11. But none of those decisions purports to clarify or modify—let alone repudiate—the rule articulated below. Nor would they have had any reason to do so. After all, one of the cases cited by respondents addressed a *Chevron* step two reasonableness analysis. *See Natural Res. Def. Council* v. *EPA*, 529 F.3d 1077, 1081-83 (D.C. Cir. 2008) (discussing text, structure, and legislative history in determining whether agency regulation was reasonable construction of statute under Chevron step two). This case, of course, concerns the D.C. Circuit's unprecedented approach to *Chevron step one* analysis, not step two. And the other case cited by respondents simply did not present the question at issue here. *See HolRail,*

LLC v. *Surface Transp. Bd.*, 513 F.3d 1313, 1317 (D.C. Cir. 2008). In *HolRail*, the court was attempting to divine the meaning of a single word—"cross"—not a statutory term of art like "valid existing rights." *See id.* The D.C. Circuit therefore had no opportunity to apply (or revisit) the troubling rule it articulated below: that an established statutory phase is nevertheless ambiguous so long as a single word in that phrase boasts multiple dictionary definitions.

The Government also attempts to sidestep the discussion of preserving property rights in SMCRA's legislative history. The Senate Report plainly states that *no provision* of the 1977 statute was intended to alter "valid existing property rights," which the Committee on Energy and Natural Resources "firmly believe[d] * * * must be preserved." S. Rep. No. 95-128 at 56 (1977) ("The Committee firmly believes that all valid existing property rights must be preserved, and has no intention whatsoever, by any provision of this bill, to change such right."). The Solicitor General nevertheless suggests that, when the Senate Report emphasized its commitment to *all* existing property rights covered by *all* provisions of the bill, it really was concerned with only one narrow set of property rights: those where the surface and mineral estates have been separated. U.S. Opp. 17. But that, of course, is not what the Report says. And the Solicitor General offers no reason for this Court to indulge his litigation position over the plain language of the statute and its accompanying Report.[5]

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[5] The D.C. Circuit opted not to review or discuss SMCRA's legislative history, which is part of the problem with the court's

5. The Solicitor General also insists that certiorari is unwarranted because, even if the D.C. Circuit had hewed to traditional methods of statutory interpretation instead of crafting an entirely new approach, the result would have been the same. U.S. Opp. 18-19. Not so. As NMA's merits briefs below demonstrated, the phrase "valid existing rights" is a term of art that that both industry and government understood to be property-protective for decades. It is only when that phrase is deconstructed and each word individually parsed is there any "ambiguity." But none of this is relevant to this Court's consideration of the petition. The fundamental flaw with the D.C. Circuit's decision below is not that it simply reached a bad bottom-line interpretation of VER—though it plainly did—but that it announced a radically new *rule* for interpreting statutes. This Court should grant the petition to review that unprecedented rule of decision.

6. The briefs in opposition offer equally subdued arguments against the second ground for certiorari articulated in the petition: whether and to what extent should courts narrow an agency's expansive interpretation to avoid foisting takings claims on the Federal Treasury? Neither respondent disputes that constitutional avoidance is particularly appropriate when takings of property are threatened. *See United States* v. *Riverside Bayview Homes*, 474 U.S. 121

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approach to statutory interpretation. Had the court considered the legislative history, this report would have featured prominently in the analysis. *See National Wildlife Fed'n* v. *Hodel*, 839 F.2d 694, 749-750 (D.C. Cir. 1988) ("Congress * * * limited the application of the surface mining proscriptions to avoid infringement of existing property rights" and "did not intend to * * * effect takings through § 522(e).").

(1985). The *Riverside Bayview Homes* Court articulated a "sensible" approach to the issue: where one interpretation of Congress's intent leads to identifiable circumstances in which takings will necessarily or even probably result and other interpretations do not, Congress likely did not intend the interpretation that triggers the taking. *Id.* at 128 n.5. NMA sought to have this "sensible" approach applied to OSM's interpretation of VER. But the D.C. Circuit declined, concluding that there did not exist sufficient *evidence* establishing that takings will occur under the VER definition adopted by the agency. Pet. 16a.

The briefs in opposition embrace the D.C. Circuit's "no evidence" approach. Gov. Opp. 24-25; KRC Opp. 16-17. But neither the D.C. Circuit nor its defenders here acknowledge what OSM itself did: that "of all the alternatives that we considered, this standard has the greatest potential to result in compensable takings" and presents "significant takings implications." 64 Fed. Reg. at 70,781. OSM further recognized that its regulation would upset "underlying property interests" and interfere with "reasonable investment-backed expectations" for many landowners and would prevent mining of thousands of acres. *Id.* at 70,776, 70,778, 70,824. And OSM understated the full takings impact of its regulation, which applies to areas that later come within SMCRA's protections as well as land currently designated under SMCRA. *See National Wildlife Fed'n*, 839 F.2d at 750-751. It is hard to envision what "evidence" (on top of OSM's candid admissions) a party would have to muster to come within *Riverside Bayview Homes*' constitutional-avoidance protection.

While the courts of appeals, including the D.C. Circuit, have tried with varying success to follow the Court's directive in *Riverside Bayview Homes*, there plainly is confusion as to how and when narrowing constructions should be applied and what amount of evidence a party must show as to likely takings before a narrowing construction is judicially applied. Granting certiorari would bring clarity to courts struggling to determine when *Chevron* deference yields to a limiting interpretation.

The confusion among the circuits cannot be chalked up to a mere intracircuit dispute, as respondents suggest. *See* Gov. Opp. 25-26; KRC Opp. 14-15. The Fifth and Eighth Circuits have held that narrowing constructions should be applied in circumstances where takings will result without references to "evidence" or the means or mode of proof. *See Texas Office of Pub. Util. Counsel* v. *FCC*, 183 F.3d 393, 437 (5th Cir. 1999) (following *Riverside Bayview Homes* and concluding that no taking resulted from agency action opening previously regulated market to competition); *Iowa Utils. Bd.* v. *FCC*, 219 F.3d 744, 754 (8th Cir. 2000) (following *Riverside Bayview Homes*, but finding it was not yet clear that a taking would result from regulatory action), *rev'd in part on other grounds sub nom. Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467 (2002). The Federal Circuit separately has opined that so long as compensation can be paid under the Tucker Act, *Riverside Bayview Homes* does not require a narrowing construction at all. *Florida Rock Indus., Inc.* v. *United States*, 791 F.2d 893, 900 (Fed. Cir. 1986). The D.C. Circuit has now held that even where an identifiable class of individuals who will have takings claims exists *and* the agency forthrightly recognizes the takings

implications of its regulation, *Riverside Bayview Homes* does not compel a narrowing interpretation to minimize such claims on the public fisc. Pet. 16a.

Responding to NMA's principal argument in a footnote, the Kentucky Resources Council asserts that the D.C. Circuit was not actually looking for "evidence" of a taking when it concluded that no "'evidence suggest[ed]'" that taking claims would expose the treasury to liability. KRC Opp. 15 (quoting Pet. 16a). The Council offers no alternative interpretation of the court's conclusion, and no credible alternative is available. The court's studious lack of attention to the facially identifiable class of takings claimants—miners with valid property rights to surface mine coal estates in a protected area who did not obtain, or make a good faith effort to obtain, permits before the land came within SMCRA's prohibitions—should be troubling, especially given this Court's previous recognition that SMCRA's VER clause is intended to prevent takings. *See Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 n.37 (1981).[6] The decision below exacerbates confusion

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[6] The cases cited by the Kentucky Resource Council as support for their argument that takings claims would not succeed are wholly irrelevant. KRC Opp. 18. *Rith Energy, Inc.* v. *United States*, 247 F.3d 1355, 1364 (Fed. Cir. 2001) held that the owner of a coal mining lease could not have reasonably expected that its operation would not be subject to environmental performance standards and regulatory oversight established in SMCRA. *Appolo Fuels, Inc.* v. *United States*, 54 Fed. Cl. 717, 734 (Fed. Cl. 2002) likewise held that the landowner purchased the land knowing of SMCRA's regulations and therefore could not have had the requisite reasonable investment-backed expectation that it could develop the land in ways SMCRA

over how to interpret and when to apply the *Riverside Bayview Homes* rule of constitutional avoidance.

7. SMCRA was enacted over 30 years ago. OSM still has not advanced a regulatory regime that comports with Congress's express intent to preserve pre-existing property rights. This Court in 1981 found it "premature" to consider the extent to which SMCRA worked a taking against owners and holders of private land, on the ground that SMCRA's "restrictions are expressly made subject to 'valid existing rights." *Hodel*, 452 U.S. at 296 n.37 (1981). The time has come. The Court should grant review, reverse the D.C. Circuit's decision, and enforce the rights Congress in SMCRA intended to preserve.

* * *

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD P. QUINN, JR.
KATIE SWEENEY
NATIONAL MINING ASSOCIATION
101 Constitution Ave., N.W.
Washington, D.C. 20001
(202) 463-2600

CATHERINE E. STETSON *
CHRISTOPHER T. HANDMAN
JESSICA L. ELLSWORTH
HOGAN & HARTSON LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5491

* Counsel of Record

Counsel for Petitioner

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prohibited. Those decisions are a far cry from the circumstances here.